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ABSTRACT

This paper from a session of the Council of Educational Facilities Planners addresses the topic of access to educational facilities by the public. It explains that many organizations and individuals request access to public educational facilities; while boards and administrators generally want to make them available for public use, problems sometimes arise when the nature of the group or proposed activity seems likely to be controversial or inconsistent with the purposes of the institution or character of the property. The paper explores legal and practical issues involved in public access from a Constitutional perspective. It addresses the differences between traditional public fora, designated public fora, and nonpublic fora, then concludes that public educational facilities are not traditional public fora and that officials should not create a designated public forum that is open to all persons for all purposes. It asserts that institutional officials need to decide whether limited public fora should be made available in certain facilities, or whether only nonpublic fora should be maintained throughout the system by exercising significant control over access. (EV)

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Controlling Access to Public Educational Facilities: Legal and Practical Issues

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Introduction

Many organizations and individuals request access to public educational facilities, seeking to use those facilities for a variety of activities. While boards and administrators generally want to make public facilities available for public use, problems sometimes arise when the nature of the group or proposed activity seems likely to be controversial or inconsistent with the purposes of the institution or character of the property. If access is denied and those who sought access turn to the courts for redress, a balance must be struck between government authority and individual rights of association and expression protected by the First and Fourteenth Amendments. The purpose of this session is to explore the legal and practical issues involved.

This session addresses the topic only from a constitutional forum analysis perspective. It does not address any issues arising under the federal Equal Access Act or the constitution or statutes of any state.

Forum Analysis

The Supreme Court has adopted a forum analysis to determine when the government's interest in limiting the use of its property and programs to their intended purposes outweighs the interest of those wishing to use the property for other purposes. The Court set out the basic framework for this analysis in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) and then further explained that framework in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993), *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), and *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

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A school district, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). A public university may establish reasonable time, place, and manner regulations and may exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education. *Widmar v. Vincent*, 454 U.S. 263 (1981).

"Nothing in the Constitution requires the government freely to grant access to all who wish to exercise rights to free speech and assembly . . . ." *Cornelius* at 799-800. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry* at 44.

In *Perry* the Court identified three types of fora--traditional public fora, public fora created by government designation, and nonpublic fora. *See, also, Arkansas Educ. Television* at ; *Cornelius* at 802.

Traditional Public Forum

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activities are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposed of assembly, communicating thoughts between citizens, and discussing public questions." . . . In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry* at 45 (citations omitted).

Designated Public Forum

> A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. . . . Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Perry* at 45-46 (citations omitted).

The designated public forum, whether of a limited or unlimited character--is property that the state has opened for expressive activity by part or all of the public. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992)

A public forum may be created for a limited purpose such as use by certain groups (*Widmar*) or for the discussion of certain subjects (*Madison*). *Perry* at 45-46, n. 7. *Widmar* and *Madison* are cases involving restricted access to public forums. *Perry* at 49, n. 9.

When a public institution establishes a limited public forum, the institution is not required to allow every person to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *See Good News Club v. Milford Cent. Sch.*, - U.S. -, 121 S. Ct. 2093 (2001).

> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. . . . Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. . . . In determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed

a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise with the forum's limitations. *Rosenberger* at 2516-17.

> Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rational for the restriction. *Rosenberger* at 2516.

> [D]iscrimination against one set of views or idea is but a subset or particular instance of the more general phenomenon of content discrimination. . . . And, it must be acknowledged, the distinction is not a precise one. *Rosenberger* at 2517.

The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. For example, if the demand for meeting rooms is greater than the supply, it would be incumbent on the public institution to ration or allocate the scarce resources on some acceptable neutral principle, but scarcity would not give institutional officials the right to exercise viewpoint discrimination that is otherwise impermissible. *Rosenberger* at 2519-20.

The Establishment Clause permits public educational institutions to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises. *Rosenberger* at 1523 (university); *Widmar*, 464 U.S. at 269 (university); *Mergens*, 496 U.S. at 252 (high school "limited open forum," pursuant to Equal Access Act); *Good News Club v. Milford Cent, Sch.*, - U.S. - (2001) (school district facilities, assumed limited public forum; program involved elementary school children).

Nonpublic Forum

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." . . . In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposed, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. *Perry* at 46 (citations omitted).

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves. *Perry* at 49.

Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose special benefit the forum was created . . . . The government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. *Cornelius*, 473 U. S., at 806

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Lamb's Chapel* at 2147.

[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about [a topic] except those dealing with the subject matter from a religious perspective. *Lamb's Chapel* at 2147.

Preserving a Nonpublic Forum

Educational facilities may be deemed to be public fora only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and institutional officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Hazelwood* at 267.

Distinction between Designated Public Forum and Nonpublic Forum

There is a distinction between "general access," which indicates the property is a designated public forum, and "selective access," which indicates the property is a nonpublic forum. On one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers (*Widmar*). On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it. *Arkansas Educ. Television* at 679.

Institutional Policies and Practices

Public educational facilities are not "traditional public fora," and institutional officials should not create a "designated public forum" that is open to all persons for all purposes.

Institutional officials need to decide whether "limited public fora" should be made available in certain facilities, either to certain groups or for certain activities, or whether only "nonpublic fora" should be maintained throughout the system by exercising significant control over access.

Not all institutional facilities need be made available on the same basis.

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